

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2004-000619-001 DT

11/29/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

PHOENIX NEWSPAPERS INC

DAVID JEREMY BODNEY

v.

CITY OF TEMPE (001)

MARLENE A PONTRELLI

MINUTE ENTRY

This Court has jurisdiction over special actions pursuant to the Arizona Constitution Article VI, Section 18, and Rule 4, Arizona Rules of Procedure for Special Actions. This matter has been under advisement and I have considered and reviewed the exhibits made of record and the excellent memoranda and oral arguments submitted by counsel.

1. Jurisdiction

Acceptance of special action jurisdiction is highly discretionary.¹ Jurisdiction is generally accepted only in those cases in which “justice cannot be satisfactorily obtained by other means,”² and may be assumed to correct plain and obvious errors.³ Rule 3 of the Arizona Rules of Procedure for Special Actions states:

The only questions that may be raised in a special action are:

- (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or

¹ *Pompa v. Superior Court In and For the County of Maricopa*, 187 Ariz. 531, 931 P.2d 431, 235 Ariz. Adv. Rep. 27 (App. 1997); *State ex rel. McDougall v. Superior Court*, 172 Ariz. 153, 155, 835 P.2d 485, 487 (App. 1992).

² *King v. Superior Court*, 138 Ariz. 147, 149, 673 P.2d 787, 789 (1983); see also *Harris Trust Bank of Ariz. v. Superior Court*, 188 Ariz. 159, 162, 933 P.2d 1227, 1230 (App. 1996).

³ *Amos v. Bowen*, 143 Ariz. 324, 326, 693 P.2d 979, 981 (App. 1984); *State ex rel. Collins v. Superior Court*, 129 Ariz. 156, 629 P.2d 992 (1981).

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- (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
- (c) Whether a determination was arbitrary and capricious or an abuse of discretion.

Jurisdiction will be accepted and exercised in this case, as the Petitioner has no other remedy for a clear violation of the Arizona Public Records Law.⁴ Moreover, the issues raised involve significant issues of public interest and concern.

2. Facts and Procedural History

The facts in this case are not in dispute. On June 15, 2004, Petitioner, Phoenix Public Newspapers, Inc. ("PNI"), submitted a Public Records Law request to the City of Tempe Public Information Office for the names, departments, titles and salaries of city employees for 2003 and 2004. Previously, the City of Tempe ("City") has provided this information to PNI twice in the last four years. On June 28, 2004, the City's Public Information Officer, Shelly Hearn, informed PNI that the Tempe City Attorney's Office had instructed her to deny PNI's request, and to offer only the release of salaries of those employees who made over \$100,000. Tempe has also offered to provide "ranges of salaries" to the Petitioner. Petitioner filed a special action on August 27, 2004, requesting that the Defendant release the City employee payroll records pursuant to the Arizona Public Records Law.⁵

3. Issues Presented and the Relevant Law

The first issue presented in this case is whether the records showing the names, titles and salaries of the City's employees, are open to public inspection. The payroll records requested by PNI are within the disclosure requirements of the Arizona Public Records Law.⁶ The City of Tempe's employees are paid out of public funds and they execute public business. State law defines "public bodies" in terms of their expenditure of public funds.⁷ The Arizona Public Records Law commands that "[p]ublic records . . . shall be open to inspection by any person at all times during office hours."⁸ In Arizona, it is clear that "access and disclosure is the strong

⁴ A.R.S. §§ 39-121 to 39-121.03 (2004).

⁵ *Id.*

⁶ A.R.S. § 39-121.01(B) provides in relevant part that "[a]ll officers and public bodies shall maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from the state"

⁷ See A.R.S. § 39-121.01(A)(2) (defining "public body" as any "public organization or agency, supported in whole or in part by monies from the state or any political subdivision of the state, or expending monies provided by the state or any political subdivision of the state.").

⁸ A.R.S. § 39-121.

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policy of the law”⁹ The Arizona Supreme Court has recognized that “all records required to be kept under A.R.S. § 39-121.01(B) are presumed open to the public for inspection as public records.”¹⁰ In addition, the City’s Personnel Rules and Regulations require the Human Resources Manager to release an employee’s name, job title, and salary information upon request, though the City of Tempe claims there may have been a clerical error in its regulations.¹¹ Under the plain meaning of the City’s regulation, the City has an affirmative duty to disclose employee names, titles, and specific salaries to the public. Range of salary appears irrelevant, as the exact salary must be disclosed as contained within the public record. Where the “statutory language is clear, the court must apply it without resorting to other methods of interpretation, unless application of the plain language would lead to impossible or absurd results.” Therefore, the names, positions and salaries of the City’s employees are subject to the disclosure mandates of the statute and the City’s personnel code.

The second issue presented is whether the City’s public salary information is exempt from the disclosure requirements of the Public Records Law. How a public body spends public funds is essential and fundamental information under the Public Records Law. Although public policy favors disclosure, the public does not have an unlimited right of inspection. The open access policy may be overcome if the official from whom disclosure is requested demonstrates with specific facts that “countervailing interests of confidentiality, privacy or the best interests of the state” necessitate nondisclosure.¹² Currently, no state statute exists that confers confidentiality or privacy on City payroll records at any salary level. Rather, it is well settled in Arizona that such information must be disclosed upon request pursuant to the Public Records Law.¹³ Similarly, the Arizona Supreme Court recognizes that the names, positions and salaries

⁹ *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984).

¹⁰ *Id.*

¹¹ Section 309 of the City of Tempe’s Personnel Rules and Regulations provides:

The Human Resources Manager or designee can release only specific types of information on current or former employees of the City. The following information is public record and shall be disclosed upon request:

1. Name
2. Job Title
3. Department
4. Supervisor’s Name
5. Date(s) of Employment
6. Salary

¹² *Carlson*, 141 Ariz. at 491, 687 P.2d at 1246.

¹³ Arizona Administrative Code R2-5-105, which applies to all State employees, states in pertinent part:

F. Disclosure of information. The Director, or designee, shall ensure that . . . the following information about an employee is provided to any person under A.R.S. Title 39, Chapter 1, Article 2 [the Public Records Law]:

1. Name of Employee;
2. Date of employment;
3. Current and previous class titles and dates received . . .
4. Current and previous salaries and dates of each change . . .

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of all employees of the Judicial Department of the State of Arizona are open to the public.¹⁴ The Arizona Attorney General has likewise found that the names and salaries of school district employees must be disclosed pursuant to the Public Records Law.¹⁵ PNI seeks precisely the same information that the Arizona Supreme Court, the Arizona Attorney General's Office and the Arizona Department of Administration have all concluded are open and available to the public: the names, titles and salaries of public employees. These authorities are consistent with the strong public policy of this State that favors broad access to records of the public's business.¹⁶

The City argues that the salary information requested is subject to a constitutional right to privacy because employees have an expectation and right to keep that information private. In support of its argument, the City cites to cases in other districts that have refused public disclosure of personnel records including salary information.¹⁷ However, these cases are not controlling legal authority in Arizona and are distinguishable on their facts. Mainly, California has an explicit exemption for personnel records, whereas no comparable exemption exists in the Arizona Public Records Law.¹⁸ Moreover, the City has failed to demonstrate with specific facts or authorities its decision to curtail access regarding employees who earn less than \$100,000. The affidavits offered by the City do not prove "the probability that specific, material harm will result from disclosure" of these records.¹⁹ Instead, the City cites purely speculative fears of potential risks of disclosure, without offering any supporting facts that are capable of demonstrating that any asserted harms will actually follow from the City's compliance with the State and local law. Nor has the City shown that any harm in fact occurred when it previously released this same information in 2000 and 2002. This court concludes that the public's interest in disclosure far outweighs the City's newly asserted interest in privacy in a myriad of ways. For instance, disclosure will allow members of the public to learn not only how much their public officials are being paid, but will permit the public to determine whether the government is lowering or raising salaries fairly or engaging in nepotism, discrimination, or fraud.

Ariz. Admin. Code R2-5-105(F) (2004).

¹⁴ Rule 123 of the Supreme Court states:

- (1) Employee Records. Records maintained concerning individuals who are employees or who perform volunteer services are closed except for the following information:
 - (A) Full name of individual;
 - (B) Date of employment;
 - (C) Current and previous job titles and descriptions, and effective dates of employment; . . .
 - (E) Current and previous salaries and dates of each change

Ariz. Sup. Ct. R. 123(e)(1)(E).

¹⁵ See, e.g., 185-023, 1985 Ariz. Op. Atty. Gen. 23 (Feb. 13, 1985), 1985 WL 70355, at 1 (finding that school districts "must furnish contract and salary information regarding school district employees").

¹⁶ *Carlson*, 141 Ariz. at 490-91, 687 P.2d at 1245-46.

¹⁷ *Teamsters Local 856 v. Priceless LLC*, 112 Cal. App. 4th 1500, 5 Cal. Rptr. 3d 847 (Cal. Ct. App. 2003).

¹⁸ See, e.g., *Bolm v. Custodian of Records*, 193 Ariz. 35, 40, 969 P.2d 200, 205 (App. 1998) (recognizing that no statute exempts personnel records from the Arizona Public Records Law).

¹⁹ *Star Publ'g Co. v. Pima County Attorney's Office*, 181 Ariz. 432, 434, 891 P.2d 899, 901 (App. 1993) ("public records are presumed open to the public for inspection unless the public official can demonstrate a factual basis why a particular record ought not to be disclosed").

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Accordingly, this court finds that the City's public employee salary information is not exempt from the disclosure requirements of the Public Records Law.

4. Conclusion

This court concludes that the City erred in refusing to disclose public records it was required by law to disclose. This court further concludes that the City of Tempe's refusal of the PNI's request for public documents and records was not reasonable, and that the positions of the city in this action have not been reasonable. An award of attorney's fees and costs to PNI is appropriate in this case.

IT IS ORDERED granting the relief sought by Petitioner, and ordering disclosure of the information requested by PNI within ten (10) days.

IT IS FURTHER ORDERED that counsel for the Petitioner shall lodge an order consistent with this opinion and its application for attorney's fees and costs by December 30, 2004.